CENTRAL VALLEY ELECTRIC COOPERATIVE, INC.

IBLA 90-486 Decided December 22, 1993

Appeal from a decision of the Area Manager, Carlsbad Resource Area, New Mexico, Bureau of Land Management, denying right-of-way application NM-77890.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--National Historic Preservation Act: Applicability--Rights-of-Way: Conditions and Limitations--Rights of Way: Federal Land Policy and Management Act of 1976

The Federal grant for a pipeline right-of-way requires BLM to comply with sec. 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (1988), on both Federal and non-Federal lands involved in the project.

APPEARANCES: Don M. Heathington, Executive Vice-President, Central Valley Electric Cooperative, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Central Valley Electric Cooperative, Inc. (Central Valley/appellant), has appealed from a June 22, 1990, decision of the Area Manager, Carlsbad Resource Area, New Mexico, Bureau of Land Management (BLM), denying an application for a right-of-way for an overhead electric transmission line. BLM denied the application because Central Valley failed to submit an archaeological report for the portions of the Potash Mine-Grubbs system improvement power line route which were not on public lands. BLM stated that such report was required by section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (1988), and implementing regulations found at 36 CFR Part 800.

Central Valley filed its application for right-of-way NM-77890 on June 27, 1989, pursuant to Title V of the Federal Land Policy and Manage-ment Act of 1976, 43 U.S.C. § 1761 (1988). The proposed power line begins in sec. 3, T. 19 S., R. 30 E., on public land and proceeds over alternating sections of land administered by BLM and the State of New Mexico.

Subsequent to the filing of the application, several letters were exchanged between BLM and Central Valley concerning the submission of an

archaeological report by Central Valley as a condition to the granting of the right-of-way. This exchange culminated in BLM's May 31, 1990, letter, wherein BLM reiterated that until it had the archaeological report for the entire power line route, the application would be incomplete, and advised appellant that if the required information were not received within 10 working days of receipt of BLM's letter, the application would be denied. Since appellant did not submit the information within the required time period, BLM denied the application in its decision of June 22, 1990, which is the subject of this appeal.

In its statement of reasons, Central Valley submits that the purpose of NHPA is "to provide leadership to contribute to the preservation of federally owned resources and to give maximum encouragement to individuals undertaking preservation by private means," not to set regulations over non-Federal lands. Appellant asserts that BLM's authority to require a report on non-Federal lands is questionable, noting that BLM admitted that rights-of-way are not clearly defined in the regulations and that specific instructions had to be issued.

Central Valley points out that the proposed line is to be constructed 30 feet north of an existing line. Because the proposed line is so close to the existing line, appellant states that "it is ridiculous to require an archaeological report on Federal land and even more so on non-Federal land."

Finally, appellant argues that "[t]he archaeological report prepared for Federal lands crossed showed no significant findings which would war-rant a report on State lands involved," and submits that if a report on State lands is required, BLM should prepare it.

Thus, the primary issues to be resolved in this case are: (1) whether section 106 of NHPA authorizes BLM to require appellant to submit an archaeological report on all non-Federal land traversed by a proposed power line as a condition to a grant of a Federal right-of-way, and (2) if a report is required, whether appellant must prepare the report and bear its cost.

Section 106 of NHPA, 16 U.S.C. § 470f (1988), provides in relevant part as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site building, structure, or object that is included in or eligible for inclusion in the National Register.

The regulations adopted by the Advisory Council on Historic Preservation define "undertaking" in relevant part as follows:

> Undertaking means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

36 CFR 800.2(o).

The first issue in this case has been previously addressed by the Department in a Solicitor's Opinion entitled, The Extent to which the National Historic Preservation Act Requires Cultural Resources to be Identified and Considered in the Grant of a Federal Right-of-Way, 87 I.D. 27 (1979). The Solicitor's Opinion reviewed the Board's decision in Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 43 IBLA 259 (1979), wherein we held that while BLM was not required under the terms of NHPA to precondition its grant of a right-of-way upon completion of a cultural resources survey on the non-Federal lands crossed, BLM may, as a matter of discretion, require such survey. Rejecting the Board's holding, the opinion concluded that "the federal grant for a pipeline right-of-way requires the Department to comply with section 106 on both the federal and non-federal lands involved in the project (emphasis added)." 87 I.D. at 28. The Solicitor's Opinion was approved by the Acting Secretary of the Interior and is therefore binding upon this Board.

As to the second issue, we conclude that BLM may require appellant to prepare the report and bear its cost. In Old Ben Coal Co. v. OSM, 109 IBLA 362 (1989), the Board stated that the ultimate responsibility for compliance with NHPA lies with the Federal agency, but this does not suggest that the Federal agency is without authority to delegate any of the required duties. Therefore, the Board found that the Office of Surface Mining Reclamation and Enforcement is authorized to require applicants for permits to mine coal to conduct cultural resource studies at their own expense. Id. at 372. That holding is equally applicable here. As to Central Valley's contention that the BLM archeologist should provide the report, BLM explained in its letter of January 11, 1990, that while it occasionally provides archaeological services to users of public lands, no archeologist was available for this project.

Lastly, Central Valley questions the need for an archaeologist report for a power line which is to be construed only 30 feet north of the exist-ing line, and asserts the report on Federal lands showed no findings which warrant a report on state lands. Under 36 CFR 800.2(o) undertakings are defined to include "new and continuing projects, activities, or programs and any of their elements not previously considered under section 106." We find that the grant of a right-of-way for Central Valley's power line fits this definition.

To the extent appellant has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge